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FILED
MAY 5 1955
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Supreme Court of the United States

October Term, 1954

No. 318

INDIAN TOWING COMPANY, INC., et al.,

Petitioners,

versus

THE UNITED STATES,

Respondent.

PETITION FOR REHEARING.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

No. 213.

INDIAN TOWING COMPANY, INC., et al.,
Petitioners,

versus

THE UNITED STATES,
Respondent.

PETITION FOR REHEARING.

The petition of the INDIAN TOWING COMPANY, INC., UPPER MISSISSIPPI TOWING CORPORATION, MINNESOTA —FARM BUREAU SERVICE COMPANY and UNITED FIREMEN'S INSURANCE COMPANY, petitioning for a rehearing in the above matter as a result of the decree entered on Monday, April 11, 1955, under which the Court, by an equal division of the Honorable members, affirmed the decision of the Honorable Herbert W. Christenberry, Judge of the United States District Court for the Eastern District of Louisiana and the per curiam decision of the United States Court of Appeals for the Fifth Circuit, with respect avers:

1.

That both the Honorable Judge Christenberry and the Honorable Judges of the United States Court of Appeals

for the Fifth Circuit decided the matter in favor of the respondent and appellee solely upon the basis of this Honorable Court's decision in *Dalehite vs. United States of America*, 346 U. S. 15, 73 Sup. Ct. 956. They took the position that the matter was completely controlled by Your Honors' decision.

2.

Your Honors are divided in that case 4 to 3, with Justice Reed writing the opinion for the majority, and the late Justice Jackson writing the minority opinion. Your petitioners aver that when this matter was argued only seven justices were on the bench; that since the date of the argument Justice Harlan has been appointed and confirmed. Your petitioners aver that, under these circumstances, they are entitled to an argument before not seven justices but before a full court in a matter of such serious and grave import as this. They respectfully call the court's attention to a case decided by his Honor Justice Harlan against the government, *Panella vs. U. S.*, 216 Fed. 2nd 622.

3.

Petitioners further aver that they are entitled to a rehearing for the reason that there are serious cases which may be determined by this case. A decision as important as this to the litigants in *Eastern Air Lines, Inc. vs. Union Trust Company, et al.*, Nos. 11,991 and 11,992 and *United States of America vs. Union Trust Company, et al.*, Nos. 12,017 and 12,018, and *Pennsylvania R.R. Co. v. United*

States, et al., A. & M. Trading Corp., et al. vs. United States; Rinn vs. United States; Geary v. United States, and related cases, 124 F. Supp. 52, (D.C.N.J. 1954) should be decided by the whole court. Petitioners would most certainly be aggrieved in the event the Court should, with a full Court, find in favor of the Eastern Air Lines and the Pennsylvania Railroad and enunciate a doctrine contrary to the one now approved by a divided court in this case.

4.

Petitioners further aver that the decision as it now stands makes the per curiam decision of the United States Court of Appeals for the Fifth Circuit the deciding factor in determining rights under the act. Since the date of the argument on February 8, 1955, namely on March 2, 1955 the Fifth Circuit Court of Appeals decided the case of *U. S. vs. Lawter*, 219 Fed. 2d 559. It was too late to call this Honorable Court's attention to this case. The case was not reported until the Advance Sheets of April 11, 1955 which was the date the case at bar was decided.

It is submitted that the Fifth Circuit Court of Appeals in the *Lawter* case completely disavowed the *Indian Towing Company, et al. vs. United States* decision. The Court distinguishes the *Lawter* case from the *Indian Towing Company* case by saying this:

> "Whatever then might be said of the liability of the United States, if the case had to do *with mere negligent omission or inaction of the Coast Guard, as was the case in Indian Towing Co. U. S. 5 Cir. 211 F (2) 886, is not controlling here* * *". (Emphasis supplied.)

The *Lawter* case was an action against the Federal Government for negligence on the part of the U. S. Coast Guard in attempting a rescue by helicopter of four people whose boat capsized in Biscayne Bay, Florida and was decided in favor of the plaintiffs and against the United States.

We have but to call the Court's attention to the precise wording of the Statute (28 U.S.C. Sec. 1346 (b)) to see that the Congress intended no differentiation between affirmative and passive negligence:

> "* * * the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States * * * for injury or loss of property * * * caused by the negligent or wrongful act *or omission* of any employee of the Government * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act *or omission* occurred." (Emphasis supplied.)

Clearly then, if the alleged "*omission to act*" were the sole basis for this decision below, and this Court had been so informed when the review was perfected and argued, petitioners feel that a reversal might have been ordered. While the archaic doctrine of governmental immunity had always been complicated with distinctions between active and inactive negligence (most of which could never be rationalized), one of the clear cut areas of liability imposed by the Federal Tort Claims Act was the "*omission to act*" as well as the *active* perpetration of a tort. The two cases are indistinguishable.

The underlying reason for the Fifth Circuit deciding this case as it did—a simple per curiam affirmance of the District Court—would never have been known, had it not been referred to (with an explanation of its basis) in *U. S. vs. Lawter.*

WHEREFORE, petitioners respectfully submit that a rehearing should be granted in order that a reargument may be had.

Most Respectfully Submitted,

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Attorney for Petitioners

CERTIFICATE.

This is to certify that copies of this brief have been served on opposing counsel by depositing in the U. S. Mail on this, the ..... day of April, 1955.

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